No. 208.

Brf. of Lindley & Eickhoff for Respondents.

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JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

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FREDERICK WILLIAMS, *Petitioner,*

vs.

GEORGE C. GAYLORD, CHARLES E. MADDRILL AND DWIGHT T. ROLFE, *Respondents.*

ON CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Brief in Behalf of Respondents.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Solicitors for Respondents.

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STATEMENT OF THE CASE.

The essential features of this case from the standpoint of both fact and law may be succinctly epitomized by us without seriously challenging the statement presented by Petitioner.

The Gold Hill Mining Company was organized June 23, 1890, under the laws of the State of West Virginia for the purpose among others of, "purchasing, operating, man-"aging and working mines in the State of California."

Record, p. 105.

It was to have two offices,—

"Its principal office to transact its business in the City "of New York, in that city, and a branch office in which "also to transact business in the City of Nevada, or at the "mines of the company near said city in the State of Cali- "fornia where the mines and property now owned by the "said corporators and others are located."

Record, p. 106.

On April 23, 1880, the Legislature of the State of California passed an Act entitled "An Act for the further pro- "tection of stockholders in mining companies," section 1 of which Act is as follows:—

"SECTION 1. It shall not be lawful for the directors "of any mining corporation to sell, lease or otherwise "dispose of the whole or any part of the mining ground "owned or held by such corporation, nor to purchase or "obtain in any way any additional mining ground unless "such act be ratified by the holders of at least two-thirds "of the capital stock of such corporation. Such ratifica- "tion may be either in writing signed and acknowledged "by such stockholders or by resolution duly passed at a "stockholders' meeting called for that purpose."

At that time the policy of the State of California with reference to foreign corporations had been established by an express provision of its Constitution in terms as follows:—

"No corporation organized outside the limits of this "State shall be allowed to transact business in this State "on more favorable conditions than are prescribed by law "to similar corporations organized under the laws of this "State."

Const. Cal., Art. 12, par. 15.

This act of the Legislature and the constitutional provision above quoted were in full force at the time of the

organization of the Gold Hill Mining Company and the execution of the instrument sought to be foreclosed in this action.

The constitutional validity, construction, scope and effect of the statute had been established and defined by the Supreme Court of California prior to the organization of the Gold Hill Mining Company.

It had been held by that Court that the provisions of the statute in question went to the power and authority of the directors; that without the consent of the stockholders *given in the manner prescribed by the act* there was no *authority* or *power* in the directors to execute the conveyance; that an instrument executed without such compliance was void and no title passed; that the consent of the stockholders could not be presumed from the mere fact of the conveyance, or from its formal execution; that judgment creditors could take advantage of the noncompliance with the statute and that the act applied to foreign mining corporations in dealing with their mining ground situated within the State of California.

In framing the charter and organizing the corporation the incorporators of the Gold Hill Mining Company and the constituency of the corporation thereafter formed must be deemed to have contracted with reference to the laws of California and with reference to the interpretation of such laws placed thereon by the Supreme Court of that State so far as concerned its transactions involving its real property in California.

The trust deed sued upon in this action as a mortgage bears date July 1, 1890, and purports to be executed by

the president and secretary of the Gold Hill Mining Company. It is executed to G. Livingston Morse of the City of New York as trustee for the purpose of securing a prospective bond issue to the amount of $50,000, the property encumbered thereby being the Nevada City Quartz Mine and other property contiguous thereto situated in Nevada County, State of California.

The only authorization for the execution of this instrument appearing in the record is a resolution adopted at a meeting of the incorporators held July 25, 1890, before the organization of the corporation by the election of directors and officers of the corporation, before the company had either issued stock or acquired any property.

Record, p. 80.

There was no attempt to comply with the laws of California with reference to the ratification of the instrument, on the part of the stockholders, as required by the Act of 1880 above quoted.

Subsequently the Gold Hill Mining Company in the conduct of its mining operations in California became largely indebted to residents of that State for material, labor, and supplies. The respondents, Gaylord, Maddrill, and Rolfe, having obtained judgments against the company on mechanics' and material men's liens, levied executions upon the property of the corporation, viz., the Nevada City Quartz Mine, and contiguous property, and at the execution sales became the purchasers of all such property.

Subsequent to these execution sales, and on November 23, 1897, the complainant, Frederick Williams, petitioner herein, a citizen of the State of New York, who had there-

tofore been substituted as trustee of the trust deed or mortgage in the place of G. Livingston Morse, deceased, commenced this action by filing a bill of foreclosure whereby he alleged that the defendant, the Gold Hill Mining Company, had executed the indenture as a mortgage or deed of trust; that it had made default in the performance of the terms and conditions of said instrument, and that the persons or parties other than said mining company impleaded as defendants, viz., respondents, Gaylord, Maddrill, and Rolfe, had or claimed to have some interest or lien upon the premises covered by the indenture sought to be foreclosed in this suit as a mortgage, which interest or lien was alleged to be subsequent to the lien of the indenture sought to be foreclosed.

The prayer of the bill was for a foreclosure of the indenture as a mortgage and for specific equitable relief.

The Gold Hill Mining Company having been duly served with process made default.

The other defendants, Gaylord, Maddrill and Rolfe, answered, setting up their status with reference to the property involved, as above specified, and further pleaded specially, *inter alia*, that the indenture was void because it had not been made in conformity with the requirements of the California statute heretofore quoted.

All of the issues are comprehensively stated in the opinion of Judge Morrow, who tried the cause.

Record, p. 53.

Upon trial of the action the Circuit Judge sustained the special defense of defendants Gaylord, Maddrill and Rolfe, above stated, held the indenture under considera-

tion invalid for noncompliance with the California statute, and directed a dismissal of the bill of foreclosure.

That court in sustaining this defense and dismissing the bill, held:—

(1) That the instrument sued upon as a mortgage was not ratified in the manner prescribed by the California statute.

(2) That the Supreme Court of California had held repeatedly (*a*) that instruments of this character were absolutely void unless ratified in one of the methods prescribed by the statute; (*b*) that any one could take advantage of this fact, and that this defense was not limited to stockholders.

(3) That the Act applied to all mining corporations whether organized under the laws of California or elsewhere.

(4) That the duty of the Federal Court was to follow the decisions of the Supreme Court of California, construing the statute, and that its duty ended when the force and effect of these decisions were stated.

This view was sustained by the Circuit Court of Appeals. The opinions of the respective courts embodied in the record clearly indicate the inductive methods by which the legal conclusions were reached.

Opinion of Circuit Court. Record, p. 53.

Opinion of Circuit Court of Appeals. Record, p. 169.

Petitioner attacks the rulings and decisions of the trial and appellate courts upon the following grounds:—

(1) The Act of the Legislature of California was intended solely for the benefit of stockholders and judgment creditors can not take advantage of a noncompliance with its terms.

(2) The act does not apply to foreign corporations.

(3) The construction placed upon the statute by the Supreme Court of California is opposed to the rule followed by other Courts of greater or equal dignity is unsound in principle, and should be ignored.

(4) The decision of the Supreme Court of California to the effect that judgment creditors may take advantage of the Act of 1880 is not binding upon Federal Courts, either as constructive of that statute or determinative of a local rule of property.

(5) The acts of the incorporators authorizing the execution of the instrument sued upon should be deemed a sufficient compliance with the law.

While petitioner elaborates these propositions and urges several subordinate, and from his standpoint, cognate principles, the foregoing outlines the real and substantial controversies in the case.

ARGUMENT.

The order in which the questions involved should be approached in argument is of no serious importance if the logical sequences are preserved. We suggest the following division of the subjects and order of presentation:—

I. The California Statute of 1880 and its interpretation by the Court of last resort of that State.

(*a*) The unlawfulness of contracts of the character sued upon unless ratified in one of the methods prescribed by the statute.

(*b*) The parties who may take advantage of noncompliance with its terms.

II. Its applicability to foreign corporations.

III. The duty of the Federal Courts to follow the State rules of interpretation.

IV. The acts relied upon by petitioner as constituting a substantial compliance with the statute as to ratification.

I.

The California statute of 1880, and its interpretation by the court of last resort of that State.

As the incorporators of the Gold Hill Mining Company in their charter specified that the purpose of the incorporation was to purchase, operate, manage and work mines in the State of California, they necessarily contracted with reference to the laws of that State, and must be assumed to have known the laws of such State.

Pinney v. *Nelson*, U. S. Sup Ct. Dec. 2, 1901; 22 Sup. Ct. Reporter, 52.

The construction placed upon such laws by the State courts of last resort is just as much a part of them, knowledge of which is imputed as if such interpretation were incorporated bodily into the statutes; such construction is a part of the statute.

Leffingwell v. *Warren*, 2 Black, 599, 603;

Christy v. *Pridgeon*, 4 Wall. 196;

Bucher v. *Cheshire R. R. Co.*, 125 U. S. 555, 582;

Chicago Union Bank v. *Kansas City Bank*, 136 U. S. 223, 235.

The incorporators, therefore, knew at the time they organized the Gold Hill Mining Company that such a law existed upon the California statute books, and that it had prior to that time been interpreted by the Supreme Court of California, as follows:—

"We think that the provision of said Act goes to the "power or authority of the directors. It cannot be con- "strued to relate merely to their personal liability, for no "penalty is imposed upon them, and to so construe it would "be to practically nullify the Act. In our opinion the "directors in mining corporations have no power or au- "thority to convey the mining ground without the consent "of holders of two-thirds of the stock given as prescribed "by the Act; and it follows without such consent the title "does not pass. And if this be so the question can be raised "by any one who connects himself with the title of the "corporation which owned the property, as well as by the "stockholders thereof. Nor can the consent of the "stockholders be presumed from the mere fact of the con- "veyance, whether under the corporate seal or not, for such "consent or ratification may be after the deed is executed, "and hence it is not necessarily or presumptively involved "in the execution of such deed."

McShane v. *Carter*, 80 Cal. 310, 312, decided Sept. 3, 1889.

The incorporators also knew that the Supreme Court of California, sitting in bank, had in a later case approved the doctrine of the McShane-Carter case and applied the rule there announced to a deed executed by a mining corporation organized under the laws of another State (Illinois) which deed purported to convey mining ground situated within the State of California.

Pekin Mining Company v. *Kennedy*, 81 Cal. 356, decided Nov. 29, 1889.

The doctrine announced in *McShane* v. *Carter* was approved in the following subsequent cases:—

Pekin Mining Company v. *Kennedy*, 81 Cal. 356;

Granite Gold Mining Company v. *McGinness*, 118 Cal. 131, 137;

Johnson v. *California Lustral Co.*, 127 Cal. 289.

Curtin v. *Salmon River Co.*, 130 Cal. 351.

It will be observed that the language of the section under consideration differs materially from the language found in similar statutes of other States to be hereafter commented on. Under the California law, contracts of the character of those under consideration are declared to be *unlawful* unless certain things are done. Or, as the statute reads, "*It shall not be lawful* for the directors of any mining corporation," etc. As was said by the Supreme Court of California in a case involving the same act:—

"The statute declares *unlawful* a mortgage or other dis-"position by the directors of the whole or any part of the "mining ground of a mining corporation, except upon the "ratification of the holders of two-thirds of the stock and "it must be enforced according to its intent."

Johnston v. *California Lustral Co.*, *supra.*

Since the decision by the Circuit Court of Appeals in this cause the Act in question has again been under consideration by the Supreme Court of California, from whose opinion we quote the following:—

"Section 1 of that act is as follows: 'It shall not be law-" 'ful for the directors of any mining corporation to sell, " 'lease, mortgage, or otherwise dispose of the whole " 'or any part of the mining ground owned or held by such " 'corporation, nor to purchase, or obtain in any way any " 'additional mining ground, unless such act be ratified by

"'the holders of at least two-thirds of the capital stock of "'such corporation.' This section does not confer upon "the stockholders any power to mortgage the property of "the corporation, or to authorize the directors to mortgage "it, and it is a familiar rule that ratification cannot give "effect to an unauthorized or invalid act, unless the per- "son or body making the ratification could in the first in- "stance have authorized the act. The corporate power and "business of the corporation must be exercised by the "board of directors (Civ. Code, sec. 305), and the stock- "holders cannot, by their own act, mortgage its property. "(*Gashwilder* v. *Willis*, 33 Cal. 11.) Any mortgage, to be "effective, must be made by the board of directors, but "under the provisions of the above act of 1880 the consent "of two-thirds of the stockholders is requisite to its valid- "ity. The stockholders are thus made a component part "of the power to make a mortgage effective, but cannot, "by any act of their own, make a mortgage, or validate one "that has not been previously authorized and executed by "the board of directors."

Curtin v. *Salmon River etc. Co.*, 130 Cal. 351.

With this exposition of the law before us if the Gold Hill Mining Company were a California corporation and the instrument in question had been executed by it in the manner shown in the record, how would it be dealt with by the California courts? There is no room for debate as to this. The courts would refuse to foreclose the mortgage. It would be an unlawful contract and therefore of no legal value. It would fall as the instruments fell in *McShane* v. *Carter*, and *Pekin M. Co.* v. *Kennedy*, *supra*.

Counsel for petitioner has in his argument failed to discriminate between a contract which by statute is declared to be *void*—which some courts construe to mean *voidable* only—and those which are declared by statute to be *unlawful*—which latter class of contracts all courts hold to be

absolutely void. This distinction is clearly pointed out in

Holder v. *Aultman Miller & Co.*, 169 U. S. 81;

Distinguishing Seamans v. *Temple Co.*, 105 Mich. 400.

The employment of the term "unlawful" in a statute establishes a public policy.

In comparing statutes of other States upon kindred subjects and analyzing decisions based upon them, we must therefore bear in mind the language of the California statute, the marked difference in the two classes of contracts, and the canons of construction applicable to them respectively. There is no lack of authority from other states upon the following propositions:—

(1) Statutes which declare certain classes of contracts void unless ratified by a certain proportion of stockholders are intended for the benefit of stockholders and the acts are voidable at their election only, or may be validated under the doctrine of estoppel.

(2) Contracts which are performed under statutes of the type last named may be ratified in any manner which will have the effect of producing an estoppel on the part of the stockholder.

But this concession by no means suggests that the California act of 1880 is of this type, or that the courts of California are committed to the interpretation of this class of statutes found in other States.

It may be conceded that if the California statute in question were before the Federal courts for construction and such courts were untrammeled by any previous interpretation thereof by the State court of last resort, the Federal tribu-

nals would be entirely at liberty to place such a construction thereon as they saw fit. Even in such a situation, however, the Federal courts in the construction of this particular statute would not blindly follow the conclusions reached by themselves and the State courts in construing statutes far less drastic and prohibitory than the one presently under consideration.

We may here note that in every one of the Federal cases cited by petitioner's counsel in support of the principal contention upon which he relies, the courts either announced that their construction of the State statutes in question was in harmony with the interpretation by the State courts, or in consonance with the policy of the State as defined in legislation and judicial decisions, or the State courts had never been called upon to construe the statute, that duty devolving for the first time on the Federal courts—a condition of affairs altogether different from that confronting us in the case at bar.

Although the fact may not serve any practical purpose under the view we take of the prohibitory character of the California statute, yet we may note in passing that there is respectable authority for applying the doctrine of *ultra vires* in its true sense to corporate acts requiring the participation of stockholders as condition precedent to the making of a valid contract under statutes which simply declare such contracts *void* unless stockholders' consent is obtained. A brief glance at some of the decisions will serve a double purpose. While furnishing precedents for the California rule, it aids the demonstration that the questions involved are local in their

nature and essentially those which each State may determine and has determined for itself regardless of rulings in other States.

In New York we find the following principles established:—

In an action by a receiver of a corporation to set aside a mortgage which had not been ratified by the requisite number of stockholders, it was urged that the action might be maintained by stockholders, but not by creditors or receivers. Said the court in commenting on the statute and sustaining the action by the receiver:—

"It is noticeable that there is thus called into action the "corporation as an artificial entity, the body of the trustees "as its agent and lastly the constituent members of the "corporation or the several individuals composing it. To "each of these a duty is assigned, and to make valid the "transaction now before us it is plain that something more "than corporate action was required. The corporation "might become a party to the mortgage and the trustees di- "rect its officers to execute it, but there still must be the "assent of the stockholders."

Vail v. *Hamilton*, 85 N. Y. 453.

Speaking of this case, the same court in a later one said:—

"In the case cited the court affirmed a judgment setting "aside at the instance of a receiver a mortgage executed by "a corporation organized under the act of 1848, on the "ground that the assent of the requisite number of stock- "holders had not been obtained. This case is an authority "for the proposition that the assent of the stockholders is "an indispensable condition to the creation of a valid "mortgage under the act of 1864."

Rochester Savings Bank v. *Averill*, 96 N. Y. 467.

The Circuit Court of Appeals of the Ninth Circuit thus states the effect of the New York decisions:—

"In the Vail case there was no assent given as required "by the statute or in any other manner, and the court held "the mortgage to be invalid. In the Rochester Bank case "it was held as in all the cases that such assent is an indis- "pensable condition of the creation of a valid mortgage, "but where such assent was not given at the time the mort- "gage was executed it would be validated in the absence of "any intervening rights by a subsequent assent, which "would operate as of the time of the execution of the "mortgage and make it valid."

G. V. B. Mining Co. v. *First National Bank*, 95 Fed. 23, 31.

The decision in this case is one upon which petitioner places great stress. It may not be out of place to here remark with regard to it that the court reached its conclusions as to the rule announced by "following the reason "and spirit of the decisions in the State of New York."

95 Fed. 23, 32.

When the same tribunal considered the case at bar, it followed the reason and spirit of the decisions in the State of California.

It may not be inappropriate at this point to again invite attention to the difference in the language employed in the California statute and that found in the laws of other States dealing with cognate subjects.

It will be observed from a consideration of the various cases cited by petitioner's counsel that, generally speaking, the statutes of various States upon the subject under consideration differ materially from the California statute. We may illustrate: The statute under consideration in the New York cases of *Vail* v. *Hamilton*, 85 N. Y. 853, and *Rochester Savings Bank* v. *Averill*, 96 N. Y. 467, permitted corporations of certain classes to mortgage their real estate,

"provided that the written assent of stockholders own-
"ing at least two-thirds of the capital stock of such
"corporation shall be filed in the office of the Clerk of the
"County where the mortgaged property is situated."

The Montana statute discussed in *Campbell* v. *Argenta G. & S. M. Co.*, 51 Fed. 1, provides that

"the board of trustees or officers of any mining corporation
"organized under the provisions of Montana laws shall
"not have power to sell, lease, mortgage or otherwise dis-
"pose of their mining ground unless they shall first obtain
"the consent of the stockholders by convening a meeting,
"due notice of which shall be given."

The Michigan statute under consideration in *Beecher* v. *Marq. & Pac. R. M. Co.*, 45 Mich. 103, is as follows:—

"No alienation, diversion, sale or mortgage of any or
"any part of the mine, works, real estate of franchise of any
"corporation mentioned in the first section of this act shall
"have any force or effect or pass any title thereto or inter-
"est therein unless expressly authorized by the vote of
"three-fifths in interest of the entire stock of said company
"actually present or legally represented at some meeting of
"stockholders called and notified," etc.

In some cases statutes declare that the acts done without the consent of the stockholders shall be "null and void," or "absolutely void," or "invalid," or that the directors must not do a certain thing without the consent of the stockholders, or they may do a certain act if authorized or approved by a certain proportion of its stockholders.

It is to statutes thus worded that the courts have applied rules of construction declaring that such acts which are within the general powers of the corporations and are performed by it without the requisite action of the stockholders are voidable only and not void.

On the other hand the California statute provides that *it shall not be lawful* for the directors of mining corporations to mortgage, etc., unless the act be ratified in a certain manner.

Is there not a marked distinction in the legal effect of the language used in different classes of statutes?

When the legislature declares that a certain act shall be unlawful unless done in the manner and under the conditions specified, the fact that the prohibited act is not *malum in se* is of no consequence. Public policy requires the enactment of many laws restricting the performance of acts and defining methods by which business may be carried on, which are not based upon any intrinsic immorality or illegality in the act itself.

As this court has said:—

"The distinction between *malum in se* and *malum prohibitum* has long since been exploded."

Gibbs v. *Baltimore Gas Company*, 130 U. S. 396, 411.

See, also,

Pennington v. *Townsend*, 7 Wend. 276.

Many States of the Union have enacted laws making it unlawful for foreign corporations to do business in the State unless they previously comply with the requirements of the law governing such corporations.

There is an abundance of authority supporting the doctrine that the acts of such corporation done or performed without complying with such State laws are *illegal—unlawful*—and no rights of property or action could arise out of them, although intrinsically such acts are untainted with a suggestion of immorality and are within the ordinary powers of the corporation.

Cary-Lombard Co. v. *Thomas*, 92 Tenn. 587;
Dudley v. *Collier*, 87 Ala. 431;
Farrier v. *New Eng. Mtg. Co.*, 88 Ala. 275;
Dundee Mtge. and Trust Co. v. *Nixon*, 95 Ala. 318;
Aetna Ins. Co. v. *Harvey*, 11 Wis. 395;
In re Comstock, 6 Fed. Cases 244 (No. 3078).

As to the validity of contracts in general which are by statute made unlawful, we cite

Buckley v. *Humason*, 16 L. R. A. 423;
Hoffman v. *McMullen*, 83 Fed. 372, 375;
Mill & Lumber Co. v. *Hayes*, 76 Cal. 387, 390;
Gardner v. *Tatum*, 81 Cal. 370;
C. M. & St. P. Ry. Co. v. *W. St. L. & P. Ry. Co.*, 61 Fed. 993;
Pennington v. *Townsend*, 7 Wend. 276.

But it is hardly necessary at this late day to cite authorities in support of the principle that an illegal contract is absolutely void and cannot form the basis of judicial proceedings; and that this illegality vitiates the contract between the immediate parties, as well as in respect to third parties. "*Ex dolo malo non oritur actio.*" Tested by the California statute, and the construction placed upon it by the Supreme Court of that State, the mortgage in question is illegal, and cannot be enforced.

It is true that in the case of *St. Louis, etc. R. R.* v. *Terra Haute etc, R. R.* 145 U. S. 393, where the statute cited contained the clause, "It shall not be lawful"—this court employed the language quoted by the learned counsel for petitioner at pages 15 and 16 of his brief to the effect that the

Illinois statute of February 16, 1865, "would seem to have "been enacted for the protection of such stockholders alone "and intended to be availed of by them only." This remark of the court as to what "would seem" to be the effect of the Illinois statute was evidently intended to state what was shown to the court to have been the ruling of the Illinois Supreme Court in the case of *Thomas* v. *Citizens' Railway,* 104 Ill. 462, cited at the end of the paragraph quoted (145 U. S. 403) wherein the Illinois Supreme Court had construed a similar act.

Mr. Justice Gray by the language quoted, therefore intended to state only what was shown to have been the construction placed upon a similar statute by the court of last resort of the jurisdiction which controlled the controversy there referred to. Moreover, Mr. Justice Gray is at pains to state that the decision of this court as expressed by his opinion is not to be regarded as an approval of the ruling referred to. He proceeds by saying at page 404:—

"It is unnecessary, however, to express a definitive opin- "ion upon the question whether the contract between these "parties was beyond the corporate powers of the *plaintiff*, "because, as is established by the decisions of this court, "already cited, a contract beyond the corporate powers of "either party is as invalid as if beyond the corporate "powers of both, *and the contract now in question was "clearly beyond the corporate powers of the defendant.*"

The judgment of the court was:—

"Upon this state of facts, for the reasons above stated, "the plaintiff, considered as a party to the unlawful con- "tract, has no right to invoke the assistance of a court of "equity to set it aside."

What the court therefore *held* was that the contract was void under the *Indiana law*. What the court *intimated but*

expressly declined to rule was that an opposite decision might have been reached if the court had been compelled to rest its decision upon the Illinois statute, because it would then have been concluded by the decision of a court of last resort in *Illinois.*

The general expressions employed in the course of the opinion must be considered in connection with the decision announced:—

"The counsel for the defendant in error urge, in oppo-
"sition to this rule of construction, some *dicta* of the court,
"in the case of *Marbury* v. *Madison.* It is a maxim, not to
"be disregarded, that general expressions, in every opin-
"ion, are to be taken in connection with the case in which
"those expressions are used. If they go beyond the case,
"they may be respected, but ought not to control the judg-
"ment in a subsequent suit, when the very point is present-
"ed for decision. The reason of this maxim is obvious.
"The question actually before the court is investigated
"with care, and considered in its full extent. Other prin-
"ciples which may serve to illustrate it, are considered in
"their relation to the case decided, but their possible bear-
"ing on all other cases is seldom completely investigated."
Cohens v. *Virginia,* 6 Wheat. 398.

We vigorously protest against the effort of the petitioner's counsel to commit this court to a ruling which it expressly declined to make.

We have gone thus fully into an examination of the St. Louis-Terre Haute case because petitioner's counsel seems to rely upon it in aid of his contention that this court has decided that a contract which fails to comply with the terms of a statute making it unlawful may nevertheless be declared valid.

As a final suggestion in this behalf we quote from a decision of this Court:—

"The fact that similar statutes are allowed different effects in different States is immaterial

"As observed by Mr. Justice Field, speaking for this court, 'The interpretation within the jurisdiction of one 'State becomes a part of the law of that State, as much 'so as if incorporated into the body of it by the Legis-'lature. If, therefore, different interpretations are given 'by different States to a similar local law, that law in 'effect becomes by the interpretations, so far as it is a 'rule for our action, a different law in one State from 'what it is in the other.'"

Chicago Union Bank v. *Kansas City Bank*, 136 U. S. 223, 235.

It is urged by petitioner's counsel that the Supreme Court of California in reaching the conclusion announced in the cited cases, that the question of failure to comply with the act can be raised by any one who connects himself with the title, did so not in the process of statutory interpretation or construction, but upon their conception of general legal principles, not involving a consideration of the language of the act itself.

Counsel, however, admits that the decision that the instrument could not be made without the required consent of the stockholders was to this extent a construction of the statute. We submit that if the instrument in question was unlawful,—*ultra vires* in its true sense, as the court in interpreting the statute has held,—the deduction that any one could take advantage of noncompliance with its terms followed as a corollary—an essential and necessary result flowing from the adjudication of the void character of the contract. All that the Supreme Court of California did

was to simply state this unavoidable result, which is therefore as much a construction of the statute as the main proposition out of which it flows.

At pages 68 and 69 of petitioner's brief counsel argues that the Supreme Court of California did not use the word *void* in its decision of the case of *McShane* v. *Carter;* that even if the word "void" had been used, it would have no more force than the same word in a statute, and that the court meant no more than that such contracts are *voidable.* He further says at page 58 that in *Granite Gold Mining Co.* v. *Magginniss*, 118 Cal. 131, and *Johnson* v. *California Lustral Co.*, 127 Cal. 283, "this Court will observe the ten-"dency of the California court to limit the meaning of the "statute."

An examination of the Lustral Company case will show that, far from mollifying the doctrine of *McShane* v. *Carter*, this case settles beyond cavil, the absolute *voidness* of such contracts. In that case the California Lustral Company had made a mortgage upon its property which "mortgage had never been ratified by the holders of its "stock, in accordance with the provisions of said statute." The mortgagor company was the sole defendant and itself set up the statute as its sole defense to the mortgage. The court below found that "lustral," or "paint-stone" land was not "mining ground" within the meaning of the act. The Supreme Court of California reversed the judgment of the court below upon this point and said: "The defense re-"lied on is hardly conscionable under the circum-"stances appearing, and it is with reluctance that we "conclude that the decision of the court respecting the "character of the land, within the contemplation of the "act of 1880, is contrary to the evidence. But the statute

"declares *unlawful* a mortgage or other disposition by the "directors of the whole or any part of the mining ground "of a mining corporation, except upon the ratification of "the holders of two-thirds of the stock, *and it must be en-"forced according to its intent.*"

Johnson v. *California Lustral Co.*, 127 Cal. 285-286.

The Supreme Court of California had the undoubted right to construe the California statute as it has construed it, regardless of what other courts have done with other statutes. This is certainly true as to domestic corporations. It cannot be contended for a moment that this court has the power in cases of this character to give a contrary construction and to nullify and obliterate the rule announced in *McShane* v. *Carter*, and subsequent cases, as applied to California corporations dealing with property within the State of California. It remains for us to determine whether or no the Gold Hill Mining Company, a foreign corporation, created for the avowed purpose of operating, working and dealing with mining ground within that State, coming into that State and conducting its business, is amenable to the statute under consideration; and, if so, can it, or its mortgagee, be permitted to contend that while it is subject to the statute it has a right to question the interpretation of it as announced by the courts of last resort of the State, and may appeal to Federal courts to ignore that interpretation.

Does the Act of 1880 apply to Foreign Corporations?

The language of the act is general, without limitation, and makes it unlawful for the directors of any mining corporation to mortgage or convey its mining ground unless

the instrument be ratified in the manner specified. There is nothing in the context to suggest a legislative intent to limit its operation to corporations organized under the laws of the State of California.

The reasoning employed and the result reached in a case decided by the Supreme Court of Ohio may with propriety be quoted on this point:—

"Section 6761, Rev. St., expressly authorizes the ac-"tion of *quo warranto* to be brought by the State against a "corporation which claims or has exercised a franchise or "privilege in contravention of law. This statute is not "limited to corporations organized under the laws of Ohio, "but applies to corporations generally. If it had been "intended to confine the application of the statute to do-"mestic corporations, apt language for that purpose would "doubtless have been employed. We hold that a foreign "corporation which is carrying on its business and making "contracts in that behalf in this State is exercising its cor-"porate franchise, from which, when exercised in contra-"vention of the laws of the State, it may be ousted by "proceedings in *quo warranto*."

State ex rel. Atty Gen'l v. *West. Mut. etc. L. & A. Soc.*, 47 Ohio, 167; 24 N. E. 392, 396.

To the same general purport we cite:—

Seyk v. *Miller's Nat. Ins. Co.*, 74 Wis. 67;

Pennington v. *Townsend*, 7 Wend. 276;

Daggs v. *Orient Insurance Co.*, 136 Mo. 382; 38 S. W. 85.

The case last cited came before this court, from whose opinion we make the following quotation:—

"It is urged that the statute is not made a condition upon "foreign corporations, but this view is not open to our "acceptance. The Supreme Court of Missouri, exercising "its function of interpretation, decides that it is."

Orient Insurance Co. v. *Daggs*, 172 U. S. 557, 567.

In other words, the determination as to whether the statute in question was or was not applicable to foreign corporations must be reached from an interpretation of the statute, and this Court felt impelled to abide by the interpretation adopted by the State court.

"The fact that this company was a foreign corporation "can make no difference. When it comes into this State by "comity to do its business here through its agents, it must "obey our laws and conform to our public policy, and if "they are unwilling to do so they must keep out of the "State."

People v. *Formosa*, 131 N. Y. 480.

"Upon the question whether the act was designed to "apply to foreign corporations made parties to suits in the "courts of this State, it may be suggested, in the first place, "that the terms of the act are general: 'No corporation "'shall hereafter interpose the defense of usury in any "'action.' There is nothing in the words of the act itself "which would indicate an intention on the part of the legis-"lature to limit its effect to domestic corporations. In the "second place, no sufficient considerations of local or State "policy have been suggested from which we would be au-"thorized to infer a motive on the part of the legislature to "restrict the operations of the act to domestic corpora-"tions."

Southern Life etc. Co. v. *Packer*, 17 N. Y. 51.

As we have heretofore observed, the Supreme Court of California applied the California statute in question (*Pekin M. Co.* v. *Kennedy*, 81 Cal. 356), as it had been construed in the McShane-Carter case, to foreign corporations.

Whatever may be the ultimate force of a decision of a court of last resort of a State upon subjects of this nature, it certainly cannot be weakened by the suggestion that the case was decided without having been fully argued or with-

out mature consideration of the question. With regard to such suggestion this Court has said:—

"Such argument might with propriety be addressed to "the Supreme Court of the State; but it is without favor "here. We are bound to presume that when the question "arose in the State court it was thoroughly considered by "that tribunal and that the decision rendered embodied its "deliberate judgment thereon."

Cross v. *Allen*, 141 U. S. 528, 538.

This "deliberate judgment" of the Supreme Court of California is assailed by counsel for petitioner upon several grounds, which we may briefly consider.

Petitioner contends that, properly construed, the act in question purports to regulate the internal affairs of corporations; that the State Legislature has no power to deal in this behalf with corporations organized under the laws of another State, therefore the California statute must be limited in its operation to domestic corporations. He cites the case of *Miles* v. *Woodward*, 115 Cal. 308, in support of this doctrine, and urges that by force of this later decision the doctrine in *Pekin Mining Company* v. *Kennedy* is nullified.

With reference to the case of *Miles* v. *Woodward*, Judge Morrow in his opinion (Record, p. 57 *et seq.*) clearly points out the distinction between the act under consideration in that case, carrying the title of "An Act amendatory of an Act entitled an Act for "the better protection of the stockholders in corpora-"tions formed under the laws of the State of California for "the purpose of carrying on and conducting the business "of mining" (Stats. Cal. 1880, p. 134), and the one involved in the case at bar which, by its terms, embraces all mining

corporations (Stats. Cal., p. 131), both acts having been approved upon the same day.

We may profitably quote the following excerpts from Judge Morrow's decision:—

"Complainant contends that the act, Stats. Cal. 1880, p. "134, and the act, Stats. Cal. 1880, p. 131, constitute but "one statute, relating only to domestic corporations, and "that consequently a foreign corporation such as the "respondent corporation is not bound by it. But an exam- "ination of the statutes in question by no means supports "complainant's position. In the first place, the titles show "very clearly the scope of the two acts, which were both "passed upon the same day. The title of the acts, Stats. "Cal. 1880, p. 131, is 'An act for the further protection of "'stockholders in mining companies;' that of the act, "Stats. Cal. 1880, p. 134, is, 'An act amendatory of an act "entitled 'An act for the better protection of stockholders "'and corporations formed under the law of the State of "'California for the purpose of carrying on and conduct- "'ing the business of mining,' approved March 30, 1874. "The general terms of the first of these titles, as contrasted "with the specific declarations comprised in the second, "must be apparent at first sight. The one is an act for the "protection of stockholders in mining corporations, the "other amends an act for the better protection of stock- "holders in mining corporations formed under the laws of "California. A comparison of the text of these two statutes "goes still further to show the distinctive feature which "marks them in separate statutes dealing with different "subjects. The act, Stats. Cal. 1880, p. 131, explicitly en- "joins as quoted above that the directors of a mining cor- "poration shall not sell, lease, mortgage, or otherwise dis- "pose of mining ground without the ratification of two- "thirds of the stockholders, which ratification must be "evidenced by writing, or by a resolution of a meeting of "stockholders called for that purpose. It prescribes "further that the stock shall be in the name of the real own- "er or trustee, and directs when the books are to be closed "and how the stock is to be voted. The act, Stats. Cal.

"1880, p. 134, lays down explicit directions for the keeping "of books, the making of a balance sheet, the duty of the "superintendent, and the examination of grounds, and "imposes certain penalties. The act of which this act is an "amendment (Stats. Cal. 1874, 866) deals precisely with "these same matters, and refers evidently and exclusively "to domestic corporations. A comparison of the two "statutes passed on April 23, 1880, leads, therefore, to the "following conclusions: The first act (Stats. Cal. 1880, "p. 131) applies to all mining corporations doing business "in this State, and regulates the actions of such corpora-"tions in selling, leasing, mortgaging, or otherwise dispos-"ing of mining ground owned by corporations in this "State. The second act (Stats. Cal. 1880, p. 134) applies "only to domestic corporations in the conduct of their "internal affairs. The former is a general law, affecting "all mining corporations transacting business in this State, "foreign corporations equally with domestic, and is in pur-"suance of the requirements of the constitution of the State "expressly providing that foreign corporations shall not "transact their business at an advantage over domestic cor-"porations."

The Circuit Court of Appeals thus expressed itself:—

"The law is well settled that each State has the power "to exclude any foreign corporation from entering into its "limits for the transaction of business except upon such "terms and conditions as it may see fit to impose. As was "said in *Hooper* v. *California*, 155 U. S. 648, 656:—

" 'The power to exclude embraces the power to regulate, " 'to enact and enforce all legislation in regard to things " 'done within the territory of the State which may be di-" 'rectly or incidentally requisite in order to render the en-" 'forcement of the ceded power efficacious to the fullest " 'extent, subject always, of course, to the paramount " 'authority of the Constitution of the United States.' "

"The Constitution of California, article 12, section 15, "declares that no corporation organized outside the limits "of this State, shall be allowed to transact business within "this State on more favorable conditions than are pre-

"scribed by law to similar corporations organized under "the laws of this State. This constitutional provision de- "clares the public policy of the State; and the supreme "court having applied the provisions of section 1 of the "statute under consideration to foreign corporations, and "the words 'any mining corporation' in said section being "broad enough to include foreign as well as domestic cor- "porations, we are not at liberty to say that such was not "the intention of the legislature because the other pro- "visions of the act are made applicable solely to domestic "corporations.

"This brings the construction of the statute in harmony "with the provisions of the constitution. *Grenada Co.* v. "*Brogden*, 112 U. S. 261, 269.

"The second and third sections of the act provide that "the stock in each mining corporation shall stand in the "books of the company in the names of the real owners or "in the names of the trustees of the real owners, and pro- "vision is made as to how the stock of the corporation shall "be voted.

"By these provisions the legislature sought only to "regulate and control the internal affairs of the domestic "corporations, as it had the right to do. Under the pro- "visions of section one the legislature did not attempt to "regulate the internal affairs of a foreign corporation. It "had no power to do so. (*Miles* v. *Woodward*, 115 Cal. 308, 311.)

"It sought to regulate and control the business affairs of "all corporations, both foreign and domestic, with refer- "ence to the manner in which their property situate within "the State may be disposed of by deed or mortgage. This "it had the power to do."

As opposed to the conclusion reached by the two courts upon the subjects heretofore discussed, counsel for petitioner takes the ground that if we take into consideration the title of the act as an aid to interpretation, we find the declared intent and purpose of it to be to protect stockholders; that the California Legislature has no concern with

the protection of stockholders in foreign corporations and that this Court, in the face of the California decisions, must hold that the act was limited in its application to domestic corporations.

There are several effective answers to this.

In the first place the title of an act cannot be resorted to in aid of interpretation except in cases of ambiguity.

The language of the act in question, "It shall not be lawful for the directors of *any* mining corporation," is entirely clear and unambiguous.

"The title of an act furnishes little aid in the construc-"tion of its provisions. * * * It cannot be used to "extend or restrain any positive provisions contained in "the body of the act. It is only when the meaning is doubt-"ful that resort may be had to the title and even then it "has little weight. It is seldom the subject of special con-"sideration by the Legislature."

Hadden v. *Larney*, 5 Wall. 107, 110.

The case of *U. S.* v. *Briggs*, 9 How. 351, is quite instructive and applicable to the question under immediate discussion. In it an act of Congress was under consideration, the title of which was "An Act to provide for the punish-"ment of offenses committed in cutting or destroying live "oak or other timber or trees reserved for naval purposes." The indictment charged Briggs with cutting white oak and hickory trees from the public lands, which class of timber was not reserved for such purposes.

The court in its opinion says:—

"The caption of the act would indicate that timber re-"served for naval purposes was meant to be protected in "this mode and none other, but the enacting clause is "*general* and not restricted to live oak, or red cedar, or tim-

"ber specially reserved for naval purposes. * * *
"Cutting and using of any other description of timber trees
"would be equally indictable * * *"

Similar principles are enunciated in:—

Price v. *Forrest*, 173 U. S. 410, 427.

The following quotation from a recognized authority on statutory interpretation is quite appropriate:—

"It is not unusual to find that the enacting part is not "exactly co-extensive with the preamble. In many acts of "Parliament, although a particular mischief is recited, the "legislative provisions extend beyond it. The preamble is "often no more than a recital of some of the inconveniences, "and does not exclude any others for which a remedy is "given by the statute. The evil recited is but the motive "for legislation; the remedy may both consistently and "wisely be extended beyond the cure of that evil; and if on "review of the whole act a wider intention than that ex- "pressed in the preamble appears to be the real one, effect "is given to it notwithstanding the less extensive import of "the preamble. (Lord Tenterden in *Doe v. Brandling*, 7 "B. & C. 660.) Thus the 4 & 5 Ph. & M., c. 8, made the ab- "duction of all girls under sixteen penal, though the pre- "amble referred only to heiresses and other girls with "fortunes. Co. Litt. 88 b. n. 14."

Endlich Interpretation of Statutes, p. 73.

Counsel for petitioner suggests that a different rule obtains where, as in California, the State Constitution prescribes that the act shall embrace but one subject, which subject shall be expressed in its title.

A failure to observe this requirement may affect the constitutionality of the statute (which, in the case at bar, has been upheld by the State courts), but not its interpretation.

Considering furthermore that in its Constitution, as heretofore noted, the State of California has declared the policy of the State concerning foreign corporations by directing that such corporations shall not be allowed to transact business in the State on more favorable conditions than are prescribed by law to similar corporations organized under State laws, which provisions of the Constitution is mandatory and prohibitory (Art. I, par. 22, Cal. Const.), and, even conceding for the moment that the act is susceptible of two constructions, one that its provisions apply to foreign corporations and the other that they do not, that construction should prevail which is in harmony with the State policy as expressed in its constitution.

"If there were room for two constructions, both equally "obvious and reasonable, the court must in deference to "the Legislature of the State, assume that it did not over-"look the provisions of the Constitution. * * * Our "duty therefore is to adopt that construction, which, with-"out doing violence to the fair meaning of the words used, "brings the statute into harmony with the provisions of the "Constitution."

Grenada Co. Supervisors v. *Brogden*, 112 U. S. 261, 268;

Cooley's Constitutional Limitations, p. 218;

Presser v. *Illinois*, 116 U. S. 252, 269.

If we may look at the titles of the two acts discussed in the opinions of the lower courts in this cause as an aid to interpretation, we find them both to have been passed at the same time; one of them applying in specific terms solely to domestic corporations, the other without any such limitation. This ought of itself to be sufficient to show a legis-

lative intent that the last act should apply to all corporations wherever formed.

There is no force in the suggestion that States have no legitimate concern with the welfare of stockholders in foreign corporations. It is a matter of common knowledge that in mining States like California, resident owners of property situated there, incorporate under the laws of other States for the purpose of avoiding some of the so-called uncomfortable features of that State's corporation laws, e. g., the assessability of stock; and that in very many cases the stockholders of the corporations organized under the laws of other States, for the purpose of acquiring property in California, are all residents of the State of California. It is equally well known that mining stocks of both domestic and foreign corporations pass current side by side in all stock markets and are purchased by the residents of the State where the mines are situated, without any regard to the domicile of the corporation.

We need not go beyond the cases cited by petitioner for examples of statutory enactments made for the protection of resident stockholders of foreign corporations.

If a state may by its laws make stockholders of foreign corporations liable for debts contracted by such corporations while doing business in the State, as decided by this court in *Pinney* v. *Nelson,* 22 Su. Ct. Rep. 52, there is no logical reason why it may not extend its patriarchal hand to such stockholders to save them from pillage and their corporate property from fraudulent confiscation.

Where in extending this protection, an act has been passed making it unlawful for such corporations to deal

with its property in the State except in a certain way, so that any attempted corporate act unless so performed is a *malum prohibitum*, it is no valid objection to the soundness of the policy or principle which dictates it that creditors may take advantage of non-compliance with the law to secure their just dues.

Since the decision of *McShane* v. *Carter* and the execution of the instrument sued upon in this action, the Legislature has amended the act in question.

The amendment provides:—

1. How the statutory ratification by stockholders may be evidenced by secretaries of mining corporations, and,

2. That no one except a stockholder shall be permitted to urge any objection to the *acquisition of any additional ground or other property by such corporation.*

In other words, in full contemplation of the decision of *McShane* v. *Carter*, the Legislature of California amended the statute involved only by providing, in effect, that no one except a stockholder might urge an objection to the *acquisition* of any additional ground or other property by such corporation. All the other provisions of the former statute, directing that it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporations, etc., are re-enacted substantially as in the former statute.

Stats. 1897 (Bancroft-Whitney Ed.), p. 96.

According to well-settled rules of construction this (with the modifications referred to) constitutes an express legislative concurrence in and approval of the rule estab-

lished in *McShane* v. *Carter* so far as it applies to conveyances or incumbrances of title to mining ground by mining corporations.

The re-enacting of the prohibitory provisions above referred to, implying an express approval of the expositions thereof made by the courts, also reaffirms the policy of the State in the premises.

III.

The duty of the Federal courts to follow the State rules of interpretation.

There can be no question as to what is the general rule uniformly followed by the Federal courts with reference to the binding force of State decisions. This rule has been tersely stated by this Court as follows:—

"Upon the construction of the Constitution and laws of a "State, this Court as a general rule follows the decisions of "her highest court unless they conflict with or impair the "efficacy of some provision of the Federal Constitution or a "rule of general commercial law. * * *

"Substantially conclusive effect is given to such decis-"ions upon the construction of State statutes as affecting "title to real estate within the State."

Gormley v. *Clark*, 134 U. S. 338.

Citations from the decisions of this Court might be multiplied indefinitely. We do not understand that counsel for petitioner denies the rule. The burden of his complaint is that the question at issue is one of "general commercial law," for the true solution of which the Federal courts are not confined to the decisions of the Supreme Court of the State.

We fail to observe how a matter which is confessedly the proper subject of state legislation when once embodied in a statute can be classified as "general commercial law." It is essentially a local state statute.

This is emphasized by the fact that not all of the States of the Union have statutes similar to the one under consideration, and in the nature of things there could be no general law of the character operating throughout the United States.

What is meant by the term "general commercial law"?

"Commercial law is a system of jurisprudence acknowl-
"edged by all maritime nations, and upon no subject is it of
"more importance than that there should be, as far as prac-
"ticable, uniformity of decision throughout the world. * *
"Commercial law, says Bouvier, is a phrase employed
"to denote the branch of the law which relates to the rights
"of property and the relations of persons engaged in com-
"merce. Persons engaged in commercial adventures,
"wherever they may have their domicile, have business
"relations throughout the civilized world, from which it
"results that commercial law is less local and more interna-
"tional than any other system of law, except the law of
"nations (p. 55). * * *
"State decisions in respect to titles to real estate and
"transfers of property, usually furnish the rule of decision
"in the Federal courts, by virtue of the beforementioned
"provision of the Judiciary Act; but the established prac-
"tice is, that it does not apply except in matters of a strictly
"local character; that is to say, to the positive statutes of
"the States and the interpretations of the same by their
"own tribunals, including rights and titles to things having
"a permanent locality, such as real property, and that it
"does not extend to questions of general commercial law,
"from which it follows that where any controversy arises
"as to the liability of a party to a bill of exchange, prom-
"issory note or other negotiable paper, in one of the Federal
"courts, which is not determined by the positive words of a

"State statute, or its meaning as construed by the State "courts, the Federal courts will apply to its solution the "general principles of the Law Merchant, regardless of any "local decision. 1 Daniel Neg. Inst. (2nd Ed.), Sec. 10."

Railroad Company v. *National Bank,* 102 U. S. 14, 31, 55, 57.

This question was quite fully considered by this Court in a case where the inquiry was identical so far as this point is concerned with the case at bar, except that the mortgage there considered was one upon personal property only. Said the Court:—

"The matter is not one of purely general commercial law. "While chattel mortgages are instruments of general use, "each State has a right to determine for itself under what "circumstances they may be executed, the extent of the "rights conferred thereby, and the conditions of their "validity. They are instruments for the transfer of prop-"erty, and the rules concerning the transfer of property are "primarily at least a matter of State regulation.

Etheridge v. *Sperry,* 139 U. S. 266, 276.

See, also,

Wilson v. *Perrin,* 11 Circuit Court of Appeals Rep., pp. 66, 68, and cases cited.

Brown v. *Furniture Co.,* 7 C. C. A. 225 (58 Fed. 286).

Counsel in the course of his argument employs the terms "negotiable bonds," and "*bona fide* holders," terms in frequent use in the Law Merchant, just as if this mere descriptive terminology earmarked the case as one of "general commercial law," and cast it into the mold of the "*lex mercatoria.*"

These "negotiable bonds" are the evidences of an indebtedness purporting to be issued by the Gold Hill Mining

Company, a foreign corporation. The validity of this indebtedness as such is not disputed. The bonds may be valid as corporate obligations, and the mortgage purporting to secure them absolutely void.

Philadelphia & S. R. R. Co. v. *Lewis,* 33 Pa. St. 33.

The bonds here in question purport to be secured by a trust deed or mortgage upon real property situated in the State of California. It is the validity of *this* instrument that is assailed because it fails to comply with the laws of the State where the property affected by it is situated.

As held by the Supreme Court of Wisconsin:—

"Section 1943 affects real estate only and is general in its "terms. It does not exempt from its operation contracts "made elsewhere. It is founded upon what the legislature "regarded as sound public policy and manifestly was in- "tended to apply to all insurance contracts, no matter "where made, affecting real property in this State. It is "as competent for the legislature to enact such a law as "one prescribing the mode of execution and the effect of "deeds, leases, or other conveyances of real property sit- "uated in this State, no matter where such instruments "were executed. Hence, conceding this to be an Illinois "contract, still it is governed by Section 1943, if otherwise "within that section."

Seyk v. *Millers' Nat. Ins. Co.,* 74 Wis. 67.

It is a familiar rule of the common law that the "*lex rei sitae*" controls the sale, hypothecation, alienation, and descent of real property. The law of the place where the property itself is situated must necessarily be looked to for the purpose of determining the validity of a questioned transfer or encumbrance. The law of the *situs* and its interpretation by the highest court of the State is just as

much a part of the contract as if they were incorporated into it. If one invests in mortgages, mortgage bonds, or real estate securities without ascertaining the condition of the title according to the law of the State where the property is situated, he does so at his peril. If the instrument under which he claims is fatally defective under the law of the place, no amount of *bona fides*, however persistently urged, will cure or atone for the defect. A deed which might be valid in West Virginia might be wholly worthless to pass title to property in California, and the decision of the question would in no sense involve a consideration of the principles of "general commercial law."

"So, though a corporation created by or under the laws "of one State has, in strictness, no extraterritorial life or "authority, and cannot of right insist upon extending its "operations within the limits of another, yet this will be "suffered without objection where no local policy forbids; "and the corporation may make contracts, and acquire, "hold and convey property as it would have a right to do in "the State of its origin. Real estate, however, it can only "take, hold, and transmit in accordance with the rules pre-"scribed by the law of the State in which the estate is sit-"uate."

Cooley's Constitutional Limitations, 150, 151.

That the State of California had the right to prescribe the manner in which instruments affecting the title to real property in that State should be executed, and to define what should and what should not be considered a valid transfer or encumbrance of such property, ought not to be seriously questioned.

"It is a principle too well established to admit of dispute "at this day, that to the law of the State in which the land "is situated we must look for the rules which govern its

"descent, alienation, and transfer and for the effect and "construction of its conveyances."

McGoon v. *Scales*, 9 Wall. 23, quoted in
Brine v. *Hartford Fire Ins. Co.*, 96 U. S. 627.

"The power of the State to regulate the tenure of real "property within her limits, and the modes of its acquisi- "tion and transfer, and the rules of its descent, and the "extent to which a testamentary disposition of it may be "exercised by its owners, is undoubted. It is an established "principle of law, everywhere recognized, arising from "the necessity of the case, that the disposition of immovable "property, whether by deed, descent, or any other mode, "is exclusively subject to the government within whose "jurisdiction the property is situated. (*McCormick* v. "*Sullivant*, 10 Wheat. 202.) The power of the State in this "respect follows from her sovereignty within her limits, "as to all matters over which jurisdiction has not been ex- "pressly or by necessary implication transferred to the "Federal Government. The title and modes of disposition "of real property within the State, whether *inter vivos* or "testamentary, are not matters placed under the control "of the federal authority. Such control would be foreign "to the purposes for which the Federal Government was "created, and would seriously embarrass the landed inter- "ests of the State."

United States v. *Fox*, 94 U. S. 315, 320.

The principle is announced and followed in numerous cases.

Jackson ex dem. v. *Chew*, 12 Wheat. 152;
Hinde v. *Vattier*, 5 Pet. 396, 400;
Livingston v. *Moore*, 7 Pet. 469, 542;
Suydam v. *Williamson*, 24 How. 427, 433;
Townsend v. *Todd*, 91 U. S. 452, 453;
Ober v. *Gallagher*, 93 U. S. 199, 207;
Hall v. *Decuir*, 95 U. S. 485, 500;

Barrett v. *Holmes*, 102 U. S. 651, 655;
Bucher v. *Cheshire R. R. Co.*, 125 U. S. 555, 582;
German Bank v. *Franklin Co.*, 128 U. S. 526, 538;
Randolph v. *Quidnick Co.*, 135 U. S. 457, 463;
Smith Purifier Co. v. *Groarty*, 136 U. S. 237, 241.
Cross v. *Allen*, 141 U. S. 528, 538;
Merchants' Bank v. *Pennsylvania*, 167 U. S. 461, 462;
Hartford F. Ins. Co. v. *Chicago M. & St. R. R. Co.*, 175 U. S. 91, 100 (1899).

"Since the ordinary administration of the law is carried "on by the State courts it necessarily happens that by the "course of their decisions certain rules are established "which become rules of property and action in the State "and have all the effect of law, and which it would be "wrong to disturb. This is especially true with regard to "the law of real estate and the construction of State consti-"tutions and statutes. Such established rules are always "regarded by the Federal courts no less than by the State "courts themselves, as authoritative declarations of what "the law is."

Burgess v. *Seligman*, 107 U. S. 20, 33;
B. & O. Railroad v. *Baugh*, 149 U. S. 368, 372.

The feature of the decision announced by the Supreme Court of California in *McShane* v. *Carter*, which is particularly obnoxious to counsel for petitioner, is that it permits parties other than stockholders to raise the question of the validity of the conveyance. He maintains that other States having similar statutes have held that only stockholders can complain of a failure to comply with their terms, and that the logic and reason is with the other States. This is quite immaterial. Each State determines for itself what rules shall apply to the disposition of prop-

erty within its limits. That two States may have precisely the same statutes on a given subject, and their respective courts place constructions diametrically opposed is no reason why Federal interposition should be invoked to compel uniformity, and force upon one State a rule sanctioned by another because the inherent logic and persuasive force of one decision may in the opinion of the Federal courts entitle it to be accepted as the rule to be applied in both States, or in all States where there are similar local statutes.

This court has heretofore had occasion to consider this class of argument, and it is conclusively disposed of as follows:—

"As to the construction of a State statute we generally "follow the rulings of the highest court of the State. . . . "So, when the highest court of a State affirms that a con- "veyance made by a debtor to a trustee for the benefit of "creditors is valid under the statutes of that State, we "should ordinarily in any case involving the validity of "such conveyance follow that ruling, *even though that "statute was common to many* States and in others a differ- "ent ruling had obtained."

Randolph v. *Quidnick Co.*, 135 U. S. 457, 463.

"The construction by the courts of a State of its consti- "tution and statutes is, as a general rule, binding on the "Federal courts. We may think the Supreme Court of a "State has misconstrued its constitution or its statutes, but "*we are not at liberty to set aside its judgments.* That court "is the final arbiter as to such questions."

Forsyth v. *Hammond*, 166 U. S. 506, 518.

A case arising under the recording Acts of Connecticut is quite instructive on this point. We quote from the opinion of the Court:—

"The question depends upon the recording Acts of the "State of Connecticut; and we are bound to follow the "decisions of the courts of that State in their construction "of these Acts, if there has been a uniform course of de- "cisions respecting them."

The Court then cites Connecticut cases which "are clear and decisive against the validity of the mortgage in question." Citing the case of *Bramhall* v. *Flood*, 41 Conn. 72, the Court continues:—

"It is there held that the mortgage must describe the "debt intended to be secured, and that it is not sufficient "that the debt be of such a character that it might have "been secured by the mortgage had it been truly described.

"*In most of the States a mortgage like the one before us, "reciting a specific indebtedness, but given in fact to secure "advances or indorsements thereafter to be made, is a valid "security*, and would be good to secure the $6,000 actually "advanced before other incumbrances were placed upon "the property. (Citing cases.)

"We should be quite willing to give the appellant the "benefit of this principle to the extent of his actual ad- "vances, *but the contrary rule seems to be so well settled in "Connecticut that we are not at liberty to do so.*"

Townsend v. *Todd*, 91 U. S. 452, 453.

And in the chattel mortgage case of *Etheridge* v. *Sperry*, heretofore cited, the Court said:—

"We are aware that there is a great diversity in the rul- "ings on this question by the courts of the several States, "but whatever may be our individual views as to what the "law ought to be in respect thereto, there is so much of a "local nature entering into chattel mortgages that this "court will accept the settled law of each State as decisive "in respect to any case arising therein."

139 U. S. 266, 276.

It is true that in other States statutes less severe than the California Act of April 23, 1880, have been construed less harshly than in California, but *this fact is of no moment* here. It cannot avail petitioner.

Where different States have adopted the *same* statutes, and their courts differ in construction, the Federal courts administer the law of each, notwithstanding seeming inconsistencies.

Shelby v. *Guy,* 11 Wheaton, 361.

"Nor does it matter that in courts of other States . . . "a different interpretation may have been adopted. If "such be the case, the courts of the United States will, in "conformity with the same principle, follow the different "ruling, so far as it affects title in those States. The in- "terpretation within the jurisdiction of one State becomes "a part of the law of that State, as much so as if incor- "porated into the body of it by the Legislature. If, there- "fore, different interpretations are given in different States "to a similar local law, that law, in effect, becomes, by the "interpretations, so far as it is a rule for our action, a "different law in one State from what it is in the other. " 'That the Statute laws of the States,' says Mr. Justice "Johnson, in delivering the opinion of this court in *Shelby* "v. *Guy,* 'must furnish the rule of decision of this court, " 'so far as they comport with the Constitution of the " 'United States, in all cases arising within the respect- " 'ive States, is a position that no one doubts. Nor is it " 'questionable that a fixed and received construction of " 'their respective statute laws, in their own courts, makes, " 'in fact, a part of the statute law of the country, however " 'we may doubt the propriety of that construction. It is " 'obvious that this admission may at times involve us in " 'seeming inconsistencies—as where States have adopted " 'the same statutes, and their courts differ in the con- " 'struction. Yet that course is necessarily indicated by " 'the duty imposed upon us, to administer as between " 'certain individuals, the laws of the respective States,

"'according to the best lights we possess of what those "'laws are.'"

Christy v. *Pridgeon*, 71 U. S. (4 Wall.) 196, 203.

"The construction so far as contract obligations incurred "under it are concerned, constitutes a part of the law as "much as if embodied in it. So far does this doctrine "extend that when a statute of two States, expressed in "the same terms, is construed differently by the highest "courts, they are treated by us as different laws, each em- "bodying the particular construction of its own State, and "enforced in accordance with it in all cases arising under "it. (*Christy* v. *Pridgeon*, 4 Wall. 196, and *Shelby* v. *Guy*, "11 Wheat. 361.) The statute, as thus expounded, de- "termined the validity of all contracts under it."

Louisiana v. *Pilsbury*, 105 U. S. 278, 294.

See, also,

Chicago Union Bank v. *Kansas City Bank*, 136 U. S. 223, 235.

As to the authority for the execution of the instrument by the officers of the corporation, and the alleged substantial compliance with the statute, as to ratification.

The record in this case discloses but one meeting of parties connected with the corporation in any capacity at which there was any attempt to sanction the execution of the instrument in question. The minutes of this meeting are found on page 80 of the Record. We there observe that the parties assembled were the incorporators and met in that capacity.

They first waived notice of the meeting, next received proof of the final incorporation of the company, then passed a resolution "that said Gold Hill Mining Company

issue one hundred *first mortgage* bonds of the denomination of five hundred dollars each," elected Morse trustee for the bond holders, and finally after all this had been done, "on motion of M. J. Shoecraft, seconded by G. L. Morse, it was voted that the incorporators of the Gold Hill Mining Company be named as the directors of the company." Whatever else may be claimed as the effect of this meeting and of these proceedings, it surely must be conceded that the resolution referred to relating to the prospective mortgage, was not adopted or passed by the directors of the corporation, The Gold Hill Mining Company, for there were no directors of the corporation named or in existence at the time when that resolution was passed.

The record in this case further shows that at no time was any resolution adopted by the board of directors of the corporation, The Gold Hill Mining Company, corresponding to the resolution of the corporators above referred to; the board of directors never did provide for or sanction such a mortgage as was specified in the corporator's resolution.

The reference of counsel for petitioner at page 50 of his brief is misleading. The resolution there referred to is merely to the effect that the company shall purchase certain mining ground and pay therefor the consideration specified in the resolution. There is nothing in the resolution which in terms or by implication sanctions the bonds referred to, and certainly nothing to authorize or ratify the mortgage in controversy.

The indenture which is the basis of this action never was authorized by any resolution or action of the board of di-

rectors of the Gold Hill Mining Company. Under the defenses pleaded in this action petitioner was required to show such authorization, and having failed to do so must be defeated. The law upon this phase of the case seems clear. In a similar case it was said:—

"The only authority upon which the president and "secretary acted was the resolution passed at the preliminary "nary meeting of stockholders, before organization of the "board of directors, and that such authorization was insufficient to support a finding of due and regular execution "is a proposition scarcely requiring authority in its support; *Gashwiler* v. *Willis*, 33 Cal. 12; 91 Am. Dec. 607; "*Alta Silver Mining Co.* v. *Alta Placer Mining Co.*, 78 Cal. "629."

Blood v. *La Serena, etc.*, 113 Cal. 221, 226.

"The president has not the power, by virtue of his office, "to mortgage the property of the company (see generally "*Bliss* v. *Kaweah C. & I. Co.*, 65 Cal. 502), nor has the "secretary such power by virtue of his office (*Blood* v. "*Maceuse*, 38 Cal. 594; 99 Am. Dec. 435;) nor have both "together the power which neither has separately, nor "have the stockholders such power (*Gashwiler* v. *Willis*, "33 Cal. 12; 91 Am. Dec. 607). The powers of a corporation must be exercised, and its power controlled by its "board of directors (Civ. Code, Sec. 305); the decision of "a majority of the directors, 'made when duly assembled,' "being valid as a corporate act (Civ. Code, Sec. 308). The "board must be duly assembled (*Harding* v. *Vandewater*, "40 Cal. 78). And their transaction should be recorded "(Civ. Code, Sec. 397; *Southern Cal. Assn.* v. *Bustamente*, "52 Cal. 192). The directors when not acting as a board, "have not the necessary power (*Gashwiler* v. *Willis*, 33 "Cal. 18; 91 Am. Dec. 607). The absence of a resolution "of the board renders the instrument invalid (*Southern* "*Cal. Assn.* v. *Bustamente*, 52 Cal. 192).

Alta Silver Mining Co. v. *Alta Placer Mining Co.*, 78 Cal. 629, 632.

See also,

Smith v. *Dorn*, 96 Cal. 82, 83;

Salfield v. *Sutter L. I. & R. Co.*, 94 Cal. 548, 549.

In the case of *Blood* v. *La Serena etc., supra*, the Court held that evidence might be adduced to show that the corporation was prevented by matters establishing an *estoppel in pais* from attacking the validity of the mortgage there involved. But the mortgage there involved was one made on the part of an ordinary commercial corporation covering agricultural lands only, and not subject to the provisions of the California Act under consideration.

As to the contention of counsel for petitioner that there was a substantial compliance with the statute as to ratification by reason (a) of the incorporators participating in the meeting referred to, and (b) because officers (president and secretary) signed the mortgage (as the act of the corporation), and that these officers held at the time more than two-thirds of the capital stock of the corporation, we respectfully submit that petitioner is foreclosed by the decision in *McShane* v. *Carter*. The California statute as construed by the California courts demands that the ratification must be made by the stockholders as *prescribed by the act*. Such ratification must be either (a) in writing signed and acknowledged by such stockholders, or (b) by resolution duly passed at a stockholders' meeting called for that purpose.

Stats. of Cal. 1880, p. 131.

The ratification contemplated by the act, as shown by the methods prescribed for its manifestation, is the approval and assent of the stockholders *in their personal ca-*

pacity and in the exercise of their individual judgment. Such approval is in nowise evidenced by the performance of the act of executing the instrument in their official capacity. On the contrary, they might have deemed themselves obliged as officers to sign an instrument which as stockholders they would refuse to ratify. As said by the California Court in *McShane* v. *Carter:*—

"Nor can the consent of the stockholders be presumed "from the mere fact of the conveyance, whether under the "corporate seal or not, for such consent or 'ratification' "may be after the deed is executed, and hence is not neces- "sarily or presumptively involved in the execution of such "deed."

80 Cal. 312-313.

In other words as we understand the statute and its interpretation by the California Court these methods are exclusive.

We may here recall the latest exposition of the act under consideration by the Supreme Court of California.

"Any mortgage to be effective must be made by the "board of directors, but under the provisions of the above "Act of 1880 the consent of two-thirds of the stockholders "is requisite to its validity. The stockholders are thus "made a component part of the power to make a mortgage "effective, but *cannot by any act of their own make a mort- "gage or validate one that has not been previously author- "ized and executed by the board of directors.*"

Curtin v. *Salmon River,* 130 Cal. 131.

The deductions flowing from the established principles in our judgment render it unnecessary to discuss the attitude of the bondholders in the case. None of them have intervened. The record discloses that the great majority of the bonds were issued by the incorporators and directors

to themselves with full knowledge of the existence of the California law and its interpretation. In some instances at least some of the bonds were used as collateral for the officers' private obligations. This aspect of the case, however, was not necessarily considered by the trial court as that court felt impelled to determine the case on the construction of the Act of 1880.

Counsel for Petitioner in his brief states that some of the defenses set forth in the answer were abandoned in the Circuit Court of Appeals. Counsel is mistaken. There has been no abandonment of any defense. As the Circuit Court based its ruling on one of the defenses alone, without discussing the others, naturally respondents' argument in the Appellate Court was in a great measure directed to the ruling of the Circuit Court. No defense has been or will be abandoned. It will not be necessary to discuss all of them in this proceeding, for the same reason which controlled us in the Circuit Court of Appeals.

RECAPITULATION.

I. Under the Act of 1880, as construed by the Supreme Court of California, the directors of mining companies have no power to convey or incumber mining ground, without the consent of two-thirds of the stock; such consent must be given in the manner prescribed by the act; without such consent, so given, the title does not pass and is not affected; the question may be raised by any one who connects himself with the title.

(*a*) The statute makes the stockholders a component part of the power to make a mortgage.

(*b*) The statute makes *unlawful* any departure therefrom.

(*c*) Being unlawful, an instrument so made is *void*.

(*d*) Being *void* and not merely voidable, no title passes or is affected; no estoppel arises by acquiescence or otherwise; any one who has an interest in the title may complain.

(*e*) The ratification contemplated by the Statute is the ratification of an instrument previously authorized by the Board of Directors, and previously executed.

II. The act applies to foreign corporations for

(*a*) The Supreme Court of California so construed it.

(*b*) There is no limitation in the language employed.

(*c*) It prescribes the sole method of conveying or encumbering a certain class of real estate which is exclusively governed by the *lex loci rei sitae*.

(*d*) The purpose of the act was to protect stockholders in *local* mines and it is well known that foreign as well as domestic corporations owned California mines and their stocks were current in Cailfornia markets.

(*e*) "It is the duty of the court to make such construc-"tion as shall suppress the mischief and advance the rem-"edy" neither of which results would have been accomplished, had not the court construed the act to apply to foreign corporations.

(*f*) Such construction is in harmony with and obedience to the mandate of the Constitution, Art. XII, par. 15; Art I, par. 22.

III. The Federal Court is bound to adopt the construction placed upon the act by the State courts, for

(*a*) It is a local act governing the "disposition of immovable property."

(*b*) It is not a question of "general commercial law," for the attack is made, not upon the bonds, but upon the instrument which purported to encumber the land.

(*c*) Every conclusion which flows out of the construction placed upon the act that the instrument is *void* is necessarily a part of the construction of the act.

IV. The instrument sued upon is of no value for

(*a*) A void contract cannot be the basis of ratification, estoppel or judicial recognition for any purpose.

We respectfully submit that the judgment should be affirmed.

CURTIS H. LINDLEY,
HENRY EICKHOFF.
Solicitors for Respondents.